

## Article Information

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## The Respect@Work Act has officially been passed by Parliament - which proposals ultimately made the cut?

***The much anticipated Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) was officially passed by both houses of parliament on 28 November 2022, implementing 7 of the recommendations from the Respect@Work Report.***

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The Government is taking significant action to combat the sadly prevalent issue of sexual harassment in Australian workplaces, with the latest changes being passed by parliament on 28 November 2022. The *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth)* (**the Bill**) implements 7 of the 55 recommendations from the Respect@Work Report, significantly strengthening the legal and regulatory framework relating to sexual harassment, expanding the role of the Australian Human Rights Commission (**the Commission**), and placing greater obligations on employers.

In our previous article, available [here](#), Piper Alderman considered the initial draft of the Bill. In this article, we consider what made it through the Parliamentary process, and what changes did not ultimately make it through the process.

### What proposals from the initially-tabled Bill remain in the final version?

After amendment by the Senate to clarify certain provisions and enable the Bill to successfully pass through Parliament without further delay, the majority of the 49 page Bill is scheduled to begin operation the day after it receives Royal Assent. The Bulk of these changes relate to the *Sex Discrimination Act 1984* and the *Australian Human Rights Commission Act 1986*.

#### Amendments to the Sex Discrimination Act (SD Act)[1]

Amendments to the SD Act will commence the day after the Bill receives Royal Assent. The Bill will introduce a new provision to the SD Act prohibiting conduct that subjects another person to a hostile workplace environment on the ground of sex. A new s 28M will consider whether a reasonable person would anticipate the possibility that the conduct in question could result in the workplace environment being offensive, intimidating or humiliating to the person by reason of their sex. The Respect@Work Report found that sexual harassment may occur where a workplace environment or culture is sexually charged or hostile, even when the conduct is not directed at a particular person.[2]

The SD Act will also be amended to include a positive duty in s 47C on employers (or a person conducting a business or undertaking) to take reasonable and proportionate measures to eliminate, as far as possible, sexual harassment or harassment on the ground of sex, conduct creating a hostile work environment under s 28M, or acts of victimisation against another person. The current legal framework does not effectively prevent sexual harassment, as it is focused on *response* rather than *prevention*. [3] This provision will shift the focus to employers in proactively preventing discrimination.

Under amendments made by the Senate, s 47C will also include a provision stipulating it will not limit, or otherwise affect

a duty that a duty holder has under the *Work Health and Safety Act 2011*, or the law of a State or Territory that deals with WHS. This amendment was included to make it clear that the positive duty in s 47C is intended to operate concurrently with state and territory WHS laws.

#### Amendments to the Australian Human Rights Commission Act (AHRC Act)[4]

The AHRC Act will also be amended in accordance with the new duty in s 47C. The Commission will be conferred with functions to: prepare and publish guidelines for compliance, promote understanding, and undertake research, all in relation to the positive duty. The Commission must have regard to the cultural diversity of Australian workplaces in exercising these functions.

The Commission will also be empowered to inquire into any matter that may relate to systemic (or suspected systemic) unlawful discrimination, which is unlawful discrimination that affects a class or group of persons and is continuous or repetitive. This power will enable the Commission to perform its systemic inquiry functions when requested to do so by the Minister, or when the Commission considers it desirable to do so.[5]

Section 46PO of the AHRC Act will be amended to enable unions and representative groups to make an application in the federal court system on behalf of person affected by unlawful discrimination or sexual harassment, provided that a complaint was made to the Commission first and that complaint had been terminated. Representative applications will provide a mechanism for genuine cases to be heard, given the complexity and costliness of the court system for individual applicants.[6] The Respect@Work Report also noted that representative applications may be particularly valuable in circumstances where a systemic problem affects a wide class of persons.

S 46PH(1)(b) of the AHRC Act will also be amended so that the Commission may terminate a complaint lodged after 24 months, rather than 6 months as it currently stands. This timeframe aims to reduce procedural barriers arising from complainants being delayed in making a complaint under the SD Act.[7] All of these changes regarding the AHRC Act will take effect the day after Royal Assent of the Bill.

Further, the Commission will be entitled, if they reasonably suspect non-compliance, to inquire into a person's compliance with the positive duty under the new s 47C in the SD Act. However, this amendment will not commence until 12 months after Royal Assent, providing employers with time to understand what the changes mean and introduce any necessary changes to their workplace.

#### Victimisation[8]

Victimisation in this context generally means when a person subjects another person to detriment because that person has made or proposes to make a complaint of discrimination. The Bill will bring consistency with the amendments made to the SD Act in 2021, that victimising conduct can form the basis of a civil action for unlawful discrimination in addition to a criminal complaint under the:

- Age Discrimination Act 2004;
- Disability Discrimination Act 1992; and
- Racial Discrimination Act 1975

These changes will also take effect the day after Royal Assent.

#### **What proposals in the initial version of the Bill were ultimately not pursued?**

After amendments by the Senate, the proposed 'cost neutrality' clause has been temporarily sidelined and referred to the Attorney-General's Department for review. This would have provided a default position that each party bears their own costs in an unlawful discrimination proceeding, but that the court would have discretion to make orders as to costs where there are circumstances justifying as such.

The Government supported the removal of the cost neutrality provisions after a number of concerns were raised by stakeholders that the cost provisions would detrimentally affect claimants. The Government says they will legislate as quickly as possible to implement the cost model that the department recommends at the end of its review.

#### **What can organisations do in response?**

Employers must be aware of these changes, and that more are likely to follow as the Government continues to implement the recommendations from the Respect@Work Report. These changes require employers to be proactive in order to be compliant, but also to be in a position to be able to *prove* that they are compliant.

Organisations will need to give consideration to:

- Updating or implementing new policies to cover sexual harassment, sex discrimination and related WHS risks in their workplace (including pro-active measures and appropriate complaint procedures);
- Undertaking meaningful and regular training for all staff, but properly tailored for leaders, line managers and staff generally;
- Improving WHS practices to include risk assessments to identify the likelihood of discrimination and harassment occurring, and measures to eliminate or control hazards/risks;
- Providing pro-active reporting methods, and other workplace monitoring programs to ensure they are best placed to continue to provide safe and thriving working environments.

Finally, it is not too late to attend our final workshop for the year on 8 December 2022 to upskill on these changes. Registrations can be made [here](#). Further training dates will be announced on our website in the new year.

[1] *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022 (Respect at Work Act)* Schedule 1; Schedule 2 Part 1

[2] *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 Revised Explanatory Memorandum (Respect at Work Bill Explanatory Memorandum)*.

[3] Ibid.

[4] Respect at Work Act, Schedule 2 Part 2; Schedule 3; Schedule 4; Schedule 5.

[5] *Respect at Work Bill Explanatory Memorandum*.

[6] Ibid.

[7] Respect at Work Act Schedule 8.

[8] Ibid Schedule 7.